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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 439

HAROLD VAN RIPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion delivered by the District Judge in connection with the revocation of petitioner's suspended sentence is not reported, but appears at R. 201–202. The opinion of the Circuit Court of Appeals (R. 299–301) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 12, 1940 (R. 301). The petition for a writ of certiorari was filed September 16,

1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the District Court had power to revoke the petitioner's suspended sentence and resentence him after the period for which he was placed on probation had expired, but within the maximum period for which he might originally have been sentenced.

2. Whether the District Court abused its discretion in revoking the petitioner's suspended sentence and resentencing him.

3. Whether the counts of the indictment upon which the petitioner was given a suspended sentence sufficiently charged offenses to enable the District Court to impose a new sentence upon vacating the suspended sentence.

STATUTE INVOLVED

Section 2 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259, 1260, as amended June 16, 1933, c. 97, 48 Stat. 256 (U. S. C., Supp. V, Title 18, Sec. 725), so far as pertinent, reads:

* * * * *

> At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant,

> or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

On June 16, 1932, the petitioner pleaded guilty to an indictment, in seventeen counts, in the United States District Court for the Southern District of New York (R. 3).[1] Counts 1 through 8 charged violations of Section 23 of the Naturalization Act (U. S. C., Title 8, Sec. 414); Counts 9 through 16 charged subornation of perjury (Criminal Code, Sec. 126; U. S. C., Title 18, Sec. 232); and Count 17 charged a conspiracy to violate the Naturalization Act. On June 30, 1932, petitioner was sentenced on Counts 1 through 8 to three years' imprisonment on each count, to run concurrently; on Count 17 to two years' imprisonment, to run concurrently with

[1] While this indictment is not included in the transcript of record of the instant case, it appears on pages 7–47 of the transcript of record entitled Petitioner's Exhibit "B" on file with the Clerk of this Court.

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the sentence imposed under the first eight counts; and on Counts 9 through 16 to five years' imprisonment on each count, to run concurrently and to commence at the expiration of the sentence imposed under Counts 1 through 8 and 17. However, sentence on Counts 9 through 16 was suspended and petitioner was placed on probation for a period of five years (R. 9). The probation was to begin at the expiration of the sentence imposed on Counts 1 through 8 (R. 293). The petitioner was incarcerated until August 29, 1933, at which time he was released on parole (R. 14).

In October, 1934, petitioner sought an order directing the Government to show cause why he should not be permitted to withdraw his plea of guilty and enter a plea of not guilty, and why the judgment of conviction should not be vacated and set aside. An order to show cause issued, and later, on January 16, 1935, petitioner made a further motion to set aside the judgment of conviction. These motions were denied on February 16, 1935. Over two years later, on June 21, 1937, petitioner moved for reargument of his previous motions, contending, *inter alia,* that no count of the indictment alleged facts sufficient to constitute an offense (R. 4–5, 299–300).[2] This motion was denied (R. 5,

[2] These motions, the supporting affidavits, and orders appear on pp. 20–93 of the transcript of record in *United States* v. *Van Riper*, 92 F. (2d) 1020 (C. C. A. 2d), on file with the Clerk of this Court as an exhibit in the instant case.

300), the order of denial was affirmed by the Circuit Court of Appeals for the Second Circuit in a *per curiam* decision, without opinion (*United States* v. *Van Riper,* 92 F. (2d) 1020), and this Court denied a petition for writ of certiorari (*Van Riper* v. *United States,* 303 U. S. 635). On May 13, 1938, the probation of petitioner was revoked by the District Court (R. 6, 300), but on appeal the order of revocation was reversed by the Circuit Court of Appeals for the Second Circuit on the ground that the Government's evidence was insufficient (*United States* v. *Van Riper,* 99 F. (2d) 816). Thereafter, by an order of the District Court dated March 31, 1939, the petitioner's period of probation was declared terminated and he was discharged from further supervision by the probation officer (R. 23).

On May 8, 1939, the Chief Probation Officer filed in the District Court an affidavit requesting that a warrant issue for the petitioner's arrest and that the suspended sentence be revoked on the grounds that the petitioner had associated with an undesirable person, had left the jurisdiction of the court without the permission of the probation officer on several occasions, had misrepresented himself to the Canadian immigration authorities as an attorney at law, had made a false statement to the probation officer as to the purpose of a trip to Cuba, had procured the smuggling into Canada of various aliens who were illegally in the United States, had

testified falsely at his previous probation revocation hearing, and had counseled and advised the making of false statements in an immigration matter and had prepared false affidavits in such matter (R. 6, 24–27). An order for petitioner's arrest issued (R. 28) and, after a hearing at which was introduced the testimony both of Government witnesses and of the petitioner (R. 40–200), the District Court filed an opinion holding that the proof was sufficient to justify revocation of the suspended sentence (R. 201–202). The District Court, accordingly, on September 8, 1939, entered an order revoking this suspended sentence (R. 203), and on October 9, 1939, imposed a sentence upon the petitioner of eighteen months imprisonment on Count 9 and five years' imprisonment on each of Counts 10 through 16, the latter terms to run concurrently and to be suspended, probation for a period of five years beginning at the expiration of the sentence on Count 9 (R. 261). On appeal this judgment was unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 299–301).

ARGUMENT

I

Petitioner urges that the District Court had lost jurisdiction in 1939 to revoke his suspended sentence and impose a new sentence under Counts 9 through 16, because the probationary period had

expired. But in *United States* v. *Moore,* 101 F. (2d) 56, the same situation existed, and the court below held that under Section 2 of the Probation Act (*supra,* pp. 2–3) the District Court had supervisory control over the probationer until the expiration of the maximum period for which the probationer might originally have been sentenced and could within that period, for good cause, vacate the suspended sentence and resentence the probationer. The court held to be without merit the contention that Section 2 differentiates between those cases in which the imposition of sentence is suspended and those in which the execution of sentence is suspended. A petition for writ of certiorari attacking these holdings was denied. *Moore* v. *United States,* 306 U. S. 664.

Here, as in the *Moore* case, the order vacating the suspended sentence and the judgment resentencing the petitioner were beyond question entered within the maximum period for which the petitioner might originally have been sentenced.[3]

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[3] When the petitioner received a suspended sentence in 1932, on Counts 9 through 16, the District Court could have given him a consecutive sentence of five years on each of those counts. It is true that in the case of a multiple-count indictment, such as in the instant case, the defendant will remain under the supervisory control of the District Court for many years beyond the strict probationary period. But the remedy is, of course, with Congress if it is felt that this works an undue hardship upon defendants.

Section 2 of the Probation Act, for the purposes of that statute, abrogates the general rule that a final judgment cannot be amended or set aside after the term at which it is entered. Accordingly, the cases cited by the petitioner, which merely state the general rule or deal with the finality for appellate purposes of a judgment the execution of which is suspended, are not in point.[4]

II

Petitioner contends that the first five of the charges upon which the vacating of the suspended sentence was sought could not be urged under the principles of *res judicata*,[5] and that there was no credible evidence to support the remaining four charges. He, therefore, urges, in effect, that the District Court abused its discretion in vacating the suspended sentence and resentencing him.

It is unnecessary to consider whether the principles of *res judicata* are applicable in a proceeding such as this, since it is manifest from the opinion of the District Court (R. 201–202) that that court did not predicate its decision solely, if at all,

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[4] There can, of course, be no doubt as to the power of Congress to change the general rule for the purposes of the Probation Act. *Scalia* v. *United States*, 62 F. (2d) 220, 222–223 (C. C. A. 1st); *United States* v. *Antinori*, 59 F. (2d) 171, 172 (C. C. A. 5th).

[5] Petitioner relies upon the prior decision in his favor by the court below in *United States* v. *Van Riper*, 99 F. (2d) 816.

upon the first five charges. In its opinion, the court specifically referred only to the charges that the petitioner had lied at the previous revocation hearing, that the petitioner had associated with one who had been convicted of violating the immigration laws, that he was involved in the smuggling into Canada of one Caracciolo, who was convicted and sentenced in Canada for the unlawful entry and subsequently deported, and that he had counseled a certain young woman to make a false affidavit relating to an immigration matter (Cf. the charges contained in affidavit for order of arrest, R. 24–27). If there was evidence to support any of these charges, the District Court cannot be deemed to have abused its discretion. Without attempting to review the evidence as to all of them, it is sufficient that there was abundant evidence to support the last charge. The Government's testimony showed that the petitioner in 1938 told one Sylvia Rosenberg, who had consulted with him with respect to obtaining a visa for her brother, to get a letter that she was regularly employed, even though she had told him that she was not employed (R. 71–72). The evidence showed, further, that petitioner prepared for her signature and that of her mother affidavits containing untrue statements that she was employed, when she was not (R. 73–75, 87–88, 283–286). The letter of employment was obtained for Sylvia Rosenberg through her sister, Esther Rosenberg, substituting Sylvia's name for

her name in the letter (R. 82–84, 287). The District Court stated in its opinion that there was "no reason to doubt" this testimony (R. 202).

While the petitioner urges that the District Court should have disregarded the testimony of Sylvia and Esther Rosenberg as unworthy of belief, the determination of the credibility of witnesses was, of course, a matter peculiarly within the province of the District Judge. *Pritchett* v. *United States,* 67 F. (2d) 244, 245 (C. C. A. 4th).

III

Finally, the petitioner contends that the District Court was without jurisdiction to resentence him because the indictment showed on its face that by reason of the provisions of the Naturalization Act the offenses charged therein could not have been committed at any time prior to the returning of the indictment.

Petitioner does not spell out the argument upon which this contention is based, but apparently relies upon the same arguments which he presented in his petition for writ of certiorari to review the adverse decision of the court below in 92 F. (2d) 1020. These arguments the Government contended in its brief in opposition were without merit and this Court denied the petition for writ of certiorari (303 U. S. 635). If petitioner's contentions can now be considered despite the prior adjudication of the Circuit Court of Appeals, he at least has pre-

sented no new arguments which would require a reconsideration of the sufficiency of Counts 9 through 16, those now involved.

Since petitioner's present attack on the indictment comes not by way of an appeal from the original sentence,[6] but is made in a probation revocation proceeding occurring long subsequent to the entry of a plea of guilty and the original sentence, the indictment is, of course, not subject to the strict scrutiny which might otherwise obtain. Cf. *Hagner* v. *United States,* 285 U. S. 427, 433.

CONCLUSION

The case was correctly decided below, there is presented no important question of Federal law, and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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[6] An appeal could have been taken from that judgment (*Berman* v. *United States*, 302 U. S. 211).

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